Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RICHARD KOSTER,

Petitioner,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did this Court, through its opinion in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), intend to create a standard of appellate review in diversity cases in which federal Courts of Appeals are permitted to reverse a District Court's denial of a motion for remittitur because the damage award deviated from awards in similar cases when state law does not impose such a standard?

2. Did the First Circuit Court of Appeals violate plaintiff-petitioner's Seventh Amendment right to a trial by jury when it decided that the jury's award of emotional distress damages deviated from awards in other cases and thus reduced the award?

3. Did the First Circuit Court of Appeals violate plaintiff-petitioner's Seventh Amendment right to a trial by jury by setting damages itself and not remanding to the District Court for further findings thus warranting summary reversal?

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OPINIONS BELOW

The decision of the First Circuit Court of Appeals is reported at *Koster v. Trans World Airlines, Inc.*, 181 F.3d 24 (1st Cir. 1999). App. 1. On May 18, 1998, the United States District Court for the District of Massachusetts (Tauro, C.J.) entered judgment in favor of the plaintiff, Richard Koster, in accordance with a jury verdict. App. 25. Thereafter, TWA filed motions for Judgment as a Matter of Law, for New Trial or Remittitur, and to Alter or Amend the Judgment. The District Court denied these motions. TWA appealed to the First Circuit.

BASIS FOR JURISDICTION

On June 21, 1999, the First Circuit entered a judgment affirming the finding of liability but reduced the jury-awarded damages. App. 26-27. Koster filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc which was denied on July 20, 1999. App. 28-29.

Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS

Seventh Amendment of the Constitution of the United States

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

On August 9, 1994, Richard Koster, a twenty-five year management level employee of the defendant, TWA, was notified that, as a result of a reduction in force, he would lose his job. A. 133; 177; 307. Koster was almost fifty years old at the time of his selection for the reduction in force. A. 307. TWA elected to retain an employee who was still in the probationary period of her employment. The probationary employee was only twenty-five years old. A. 309; 313; 513.

Koster commenced an action in the Massachusetts Superior Court alleging age discrimination in violation of Massachusetts General Laws c. 151B. TWA removed the case to the United States District Court for the District of Massachusetts based upon diversity of citizenship. Jurisdiction was proper in the United States District Court pursuant to 28 USC § 1332.

After a five day jury trial presided over by the Chief Judge of the District Court, the jury returned a verdict for the plaintiff in the amount of $1,000,000. Although the plaintiff had requested that the jury be made to answer special questions allocating damages between back pay, front pay, and emotional distress, the defendant opposed the request and the resulting verdict was a general verdict encompassing all three elements of damage. The District Court found that TWA knowingly violated the statute and, pursuant to Massachusetts General Laws c. 151B, § 9, doubled the damages. Also, pursuant to the state statute, the District Court awarded attorneys fees of $155,807.50 and $4,855.75 in costs. On May 18, 1998, the District Court entered judgment as set forth above with interest of $206,014.99.

TWA moved for Judgment as a Matter of Law, for a

New Trial or Remittitur, and to Alter or Amend the Judgment. The District Court denied these motions. Thereafter, TWA appealed.

The First Circuit affirmed the finding of liability but reduced the award of emotional distress damages. In doing so, the First Circuit extrapolated the amount of emotional distress damages contained in the general verdict and held that such damages equaled $716,000. App. 14. The First Circuit then held that the emotional distress damages were excessive *when compared to the award of such damages in other discrimination cases.* App. 14-15. The First Circuit reviewed awards in other cases and held that "after our careful review of the record and thoughtful consideration of other cases, we believe the evidence of emotional distress would support a maximum recovery of emotional damages of $250,000." App. 18. Thus the First Circuit employed a "deviates materially" standard of review foreign to the law of Massachusetts.

The First Circuit remanded the case to the District Court where Koster was required to accept the remittitur imposed by the First Circuit or elect a new trial on damages. App. 18, 25. The District Court was not permitted to reevaluate the motion for remittitur since the First Circuit concluded that the maximum recovery which could be permitted was $250,000. App. 18.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Introduction

The question of what "abuse of discretion" means in the context of appellate court review of District Court denials of motions for remittitur was addressed by this Court in a narrow

factual setting in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). In *Gasperini*, this Court held that the abuse of discretion standard should be employed by appellate courts in reviewing District Court denials of motions for remittitur. The Court of Appeals in *Gasperini* held that the District Court had abused its discretion in failing to apply the "deviates materially" standard codified in a New York statute and reduced damages itself. A majority of this Court held that the *Erie* doctrine mandated that the federal District Court employ the deviates materially standard set forth in the New York statute. However, the majority held that it was error for the Court of Appeals to apply the standard and fix damages itself.

In the present case, the First Circuit Court of Appeals employed the "deviates materially" standard even though Massachusetts does not have a statute similar to the one involved in *Gasperini*. The First Circuit expressly relied on the *Gasperini* decision in holding that its review was limited to abuse of discretion. Although less express, it is clear that the First Circuit also employed the deviates materially standard from *Gasperini*. The imposition of the "deviates materially" standard by the First Circuit, in the absence of a state statute like the one in *Gasperini*, represents a dramatic shift in the scope of federal appellate review and a violation of the plaintiff's Seventh Amendment right to a trial by jury. *Gasperini* did not create a new standard of general applicability and its extremely narrow holding is being used to eradicate the Seventh Amendment right to a jury determination. The First Circuit and other circuits now employ the "deviates materially" standard.

Certiorari is needed to clarify the meaning of "abuse of discretion" in the context of the denial of a motion for remittitur where no state statute imposes either a hard cap on damage or the deviates materially standard. Even if this Court

does hold that a District Court abuses its discretion by not employing the deviates materially standard on a motion for remittitur, summary reversal is warranted because the First Circuit clearly violated the petitioner's Seventh Amendment rights by setting damages itself and not remanding to the District Court as mandated by *Gasperini*.

I. TRADITIONAL SHOCK THE CONSCIENCE REVIEW IS MORE LIMITED THAN THE "DEVIATES MATERIALLY" STANDARD.

Motions for remittitur are governed by Rule 59 of the Federal Rules of Civil Procedure. In ruling on motions for remittitur, District Courts are limited to determining whether the award is "grossly excessive," *McCoy v. Goldberg*, 810 F. Supp. 539, 542 (SDNY 1993).

> A trial judge should not order a remittitur or a new trial when the size of the verdict turns upon conflicting evidence and the credibility of the witnesses. The jury's award will be considered inviolate so long as it is not 'so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial.'

Palmer v. City of Monticello, 31 F.3d 1499, 1508 (10th Cir. 1994). Massachusetts trial courts are governed by the same standard under Rule 59 of the Massachusetts Rules of Civil Procedure. *Moose v. Massachusetts Institute of Technology*, 683 N.E.2d 706, 712 (Mass.App.Ct. 1997).

The limited nature of the traditional inquiry must be

contrasted with the New York statute at issue in *Gasperini*. Under N.Y. Civ. Prac. Law and Rules (CPLR) § 5501(c),

> appellate courts are empowered to review the size of jury verdicts and to order new trials when the jury's award 'deviates materially from what would be reasonable compensation.'

Gasperini, 518 U.S. at 418.

The determination of whether a jury's damage award deviates materially from what would be considered reasonable compensation is determined in New York by reference to awards approved in similar cases. *Id.* at 425. This review is clearly broader than the traditional Rule 59 review under either federal or Massachusetts law:

> As stated in Legislative Findings and Declarations accompanying New York's adoption of the "deviates materially" formulation, the lawmakers found the "shock the conscience" test an insufficient check on damage awards; the legislature therefore installed a standard 'inviting more careful appellate scrutiny.'

Id. at 423.

> New York's Legislature codified in § 5501(c) a new standard, one that requires closer court review than the common law "shock the conscience" test. More rigorous comparative evaluations attend application of § 5501(c)'s

"deviates materially" standard.

Id. at 429. Indeed, the majority noted that the relevant question to be answered in determining whether the New York law was substantive and thus required to be employed by the federal courts was:

> Would 'application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum state, or] be likely to cause a plaintiff to choose the federal court?

Id. at 428. Ultimately, the majority answered this question in the affirmative thus highlighting the extreme schism between the deviates materially standard and the shock the conscience standard.

II. THE MAJORITY IN *GASPERINI* HELD ONLY THAT THE CIRCUIT COURT WAS CORRECT IN DETERMINING THAT THE NEW YORK STATUTE SHOULD BE APPLIED. IT DID NOT CREATE A NEW STANDARD OF APPELLATE REVIEW.

In *Gasperini*, this Court did not announce a new standard of general applicability to be applied by all federal Courts of Appeals when reviewing a District Court's denial of a motion for remittitur. To the contrary, the majority noted the difficulty in the case: on the one hand disregarding the New York statute, if it constituted a substantive rule of law, would violate the *Erie* doctrine while on the other hand allowing the

federal appeals court to decide the appropriate level of damages would fundamentally alter the "division of trial and appellate court functions" and thus run contrary to the Seventh Amendment. *Id.* at 426. Thus, the question was how to give effect to the New York statute without damaging the plaintiff's Seventh Amendment right to a jury trial.

The majority's answer was packaged in a very narrow holding. Despite the New York statute's reference to the New York Appellate Division, the Court held the statute to be a substantive rule applicable in federal diversity cases involving New York law. However, the majority also held that:

> . . .the Second Circuit did not attend to '[a]n essential characteristic of the [federal-court] system,' when it used § 5501(c) as 'the standard for [federal] ***appellate review***.'

Id. at 431 (emphasis added) citing *Byrd v. Blue Ridge Elec. Cooperative, Inc.*, 356 U.S. 525, 537 (1958) with approval, the majority continued its discussion by stating:

> 'The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.' The Seventh Amendment, which governs proceedings in federal court, but not in state court, bears not only on the allocation of trial

> functions between judge and jury, the issue in *Byrd*; it also controls the allocation of authority to review verdicts, the issue of concern here.

Id. at 432. The majority then held that:

> the re-examination clause of the Seventh Amendment ***does not inhibit the authority of trial judges to grant new trials*** 'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

Id. at 433 (emphasis added). Finally, the majority held:

> New York's dominant interest can be respected, without disrupting the federal system, ***once it is recognized that the federal district court is capable of performing the checking function***, i.e., ***that court*** can apply the State's 'deviates materially' standard . . . Within the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, ***not the court of appeals***, primary responsibility for application of § 5501(c)'s 'deviates materially' check. ***Trial judges have the 'unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the 'cold paper record.'***

Id. at 437-438 (emphasis added).

Ultimately, the majority held only that the Second

Circuit's holding that the District Court abused its discretion was proper in light of the fact that the District Court did not employ the deviates materially standard.[1] The Court held:

> It does not appear that the District Court checked the jury's verdict against the relevant New York decisions demanding more than 'industry standard' testimony to support an award of the size the jury returned in this case. . .Accordingly, we vacate the judgment of the Court of Appeals and instruct that court to remand the case to the District Court so that the trial judge, revisiting his ruling on the new trial motion, may test the jury's verdict against CPLR § 5501(c)'s 'deviates materially' standard.

Id. at 439. Whether a District Court employed the correct standard is a question of law and does not run afoul of the Seventh Amendment. However, an independent evaluation of the proper damages, as stated in the *Gasperini* dissent, is an inherently factual determination and is not a proper role for a federal Court of Appeals. As Justice Scalia reiterated:

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[1] The majority in *Gasperini*, in effect, viewed the case as an *Erie* case whereas the dissent viewed it as a Seventh Amendment case. However, the majority conceded that "Application of §5501(c) at the trial level is key to this case." *Id.* at 428. Application of the deviates materially standard at the appellate level results in a collision with the Seventh Amendment. In Massachusetts, trial courts are not empowered, let alone required, to employ a deviates materially standard. Thus, the Seventh Amendment question in the present case cannot be avoided by application of the *Erie* doctrine.

> No less than the existence of liability, the proper measure of damages 'involves only a question of fact,' as does a 'motion for new trial based on the ground that the damages. . . are excessive.' [citations omitted].

Id. at 453 (Scalia, J., dissenting). In light of this fact, the majority required the case to be remanded to the District Court so that it, and not the Court of Appeals, could employ the correct standard. *Id.* at 439.

III. THE FIRST CIRCUIT COURT OF APPEALS EMPLOYED THE "DEVIATES MATERIALLY" STANDARD AND THUS VIOLATED MR. KOSTER'S SEVENTH AMENDMENT RIGHT TO A JURY DETERMINATION.

As previously stated, there exists no Massachusetts statute which requires a state court judge, either at the trial or appellate level, to review a jury's damage determination under the "deviates materially" standard. Thus, the "key" to the *Gasperini* case is absent here and there could be no finding in this case that the District Court abused its discretion by failing to employ the inapplicable and far stricter "deviates materially" standard.

Nevertheless, the First Circuit employed the "deviates materially" standard. In deciding the jury's award of emotional distress damages was excessive, the First Circuit merely reviewed awards of emotional distress in other discrimination cases. App. 15-16 ("The Supreme Judicial Court held that a $550,000 award for emotional distress was excessive in *Labonte*); App. 15-16 ("In *Sanchez* . . . [t]he district court

reduced the award to $37,500. . ."); App. 16 ("One of the highest emotional distress judgments in Massachusetts was awarded in *Westinghouse Electric Supply Corp. v. Massachusetts Commission Against Discrimination.*").

The First Circuit then reviewed other state and federal cases in which the trial court did remit damages. App. 16-17. However, the only fact proved by these cases is that trial judges, who witness the evidence including the demeanor of the victim of discrimination as he describes his emotional distress, do take seriously their responsibility to order remittiturs when the case calls for it.

One of the cases cited by the First Circuit was *Hetzel v. County of Prince William, Virginia*, 89 F.3d 169 (4th Cir. 1996). In *Hetzel*, the Court of Appeals ordered the District Court to recalculate emotional distress damages by referring to awards in two other cases which the court believed to be "comparable to what would be an appropriate award in [the case at bar]." *Id.* at 173. Hetzel petitioned this Court for *certiorari* arguing that the Fourth Circuit had failed to employ the abuse of discretion standard announced in *Gasperini*. *In re Board of County Supervisors of Prince William County*, 143 F.3d 835, 836-837 (4th Cir. 1998). This Court denied *certiorari*. 519 U.S. 1028 (1996). Later, this Court took *certiorari* to answer the question of whether the petitioner's Seventh Amendment rights had been violated by being ordered to accept a remittitur without being given the option of a new trial. This Court held that the petitioner's Seventh Amendment rights had been violated. 523 U.S. 208 (1998).[2]

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[2] In this case, the First Circuit decided that $250,000 was the maximum award that the petitioner could ever receive. Thus, the election afforded to petitioner to accept remittitur or a new trial was

In its opinion, this Court noted, without obvious disapproval, that the Fourth Circuit Court of Appeals had instructed the District Court to ". . .closely examine two cases it had previously noted as comparable to what would be an appropriate award in petitioner's case." *Id.* at 209. On remand, the Fourth Circuit took this statement, which did not relate to the issue under consideration, as approval of the deviates materially standard. The Fourth Circuit held:

> The Supreme Court having not disturbed our order of mandamus insofar as it directed the district court to recalculate damages, that portion of our order stands . . . In recalculating damages, the district court is, pursuant to our earlier mandate, to 'closely examine the awards in [two other cases].' *Id.*[3]

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meaningless.

[3] The Fourth Circuit's decision on remand is instructive reading. It unmasks the appeals court's bias against the plaintiff and anger with the district court. It raises the irresistible inference that the Fourth Circuit was motivated by passion or prejudice when it ordered the remittitur. The Seventh Amendment is intended to prevent appellate courts from imposing their own view of the evidence and thus avoid the perception problem that the *Hetzel* case magnifies. Indeed, on remand to the District Court, the trial judge found that emotional distress damages should be set at $50,000. *In re Board of County Supervisors of Prince William County,* 143 F.3d at 837. The Fourth Circuit disagreed holding that maximum damages were fixed at $15,000 because of damages awarded in other cases. *Id.* at 842. In an esoteric area such as the award of emotional distress damages, can it really be said that the plaintiff suffered $15,000 of damages and not $50,000, as a matter of law?

In re Board of County Supervisors of Prince William County, 143 F.3d at 842; *see also, Steinke v. Beach Bungee, Inc.*, 105 F.3d 192, 197-198 (4th Cir. 1997)(holding that, under *Gasperini*, the trial court should have reviewed other state cases to determine range of damages).

The First Circuit's reliance on *Hetzel* is troubling and signals a new level of appellate review clearly at odds with the constitution. Emotional distress damages are indeed "esoteric" as the First Circuit noted. App. 18. That is why relying on seven eye witnesses, including the Chief Judge of the District Court, is constitutionally mandated and preferable to having an appellate court conclude that damages are lower.[4]

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[4] To allow appellate courts to adjust damages invites re-examination of liability questions as well. It is too easy for an appellate court to reduce damages because of a belief, whether conscious or not, that evidence of liability is thin. Indeed, appellate courts have taken a broad role in reversing jury determinations - particularly in discrimination cases. Schnapper, *Judges Against Juries - Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 236, 249 (52.9% of all federal discrimination cases between October, 1984 and October, 1985, in which the federal court reviewed the facts supporting a jury verdict, were reversed). Without clarification, *Gasperini* may be the beginning of the end of the Seventh Amendment.

IV. UNDER ANY VIEW OF THE LAW, THE FIRST CIRCUIT VIOLATED PETITIONER'S SEVENTH AMENDMENT RIGHTS BY ENTERING DAMAGES ITSELF.

Appellate courts must rely on the experienced trial judges who preside over cases and so long as there is no evidence that the District Court employed the wrong standard of review, appellate courts must uphold a jury's factual damage determination and the District Court's denial of a motion for remittitur. Thus, where the District Court denies remittitur, the appellate court should determine only whether the correct standard was employed by the District Court. If the amount of the award, itself, causes the appellate court to wonder whether the correct standard was employed, the court should send the case back for further findings to satisfy itself that the District Court reviewed the remittitur motion under the correct standard. *Gasperini,* 518 U.S. at 437-438; *Steinke, supra,* 105 F.3d at 198.

The First Circuit did not and could not find that the District Court employed the wrong standard of review and thus could not find that the District Court abused its discretion. *See, e.g. Mejias-Quiros v. Maxxam Property Corp.,* 108 F.3d 425, 427 n. 1, where the First Circuit, itself, recognized:

> If local law placed a substantive cap on medical damages, it would control [citing *Gasperini*], but Puerto Rico case law suggests no such departure from ordinary practice.

Even if Massachusetts placed a substantive cap on emotional distress damages, the only avenue available to the First Circuit was to remand the case to the District Court for a report of

further findings. However, the First Circuit held:

> We recognize that we have the option of selecting a reduced damages figure ourselves based on the evidence adduced at trial, or remanding the case to the district court for a determination of damages.

App. 18 (citing two pre-*Gasperini* First Circuit decisions). This ruling violated the petitioner's right to a trial by jury even according to the majority in *Gasperini.* 518 U.S. at 437-439. Thus, the First Circuit Court of Appeals violated the plaintiff's Seventh Amendment rights by entering damages itself and summary reversal is warranted.

On remand, if the District Court signals to the appellate court its observation that the jury award was not motivated by passion or prejudice, the Seventh Amendment demands that the award be upheld.[5] Alternatively, if the District Court is required to reduce damages, the District Court should impose the remittitur which would then be subject to review for abuse of discretion. Although the First Circuit concluded that proper emotional distress damages were $250,000, the District Court cannot be bound by that finding. *See, e.g., Gasperini v. Center for Humanities, Inc.*, 149 F.3d 137 (2nd Cir. 1998) where, on remand, the District Court reduced damages by $75,000 notwithstanding the circuit court's prior ruling that damages should be reduced by at least $350,000. After remand, the

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[5] Petitioner believes remand to the District Court to be unnecessary since the District Court unquestionably understood and employed the correct standard. Thus, the jury's verdict should be reinstated.

Second Circuit held:

> The district court acted within its discretion. It did not commit legal error in applying § 5501(c), and considered the proper factors in determining the reasonableness of the jury award. . .And although the first [appellate] panel concluded, based on its review of a 'cold paper record,' and without having examined any of the slide transparencies, that the award in this case deviated materially from reasonable awards in similar cases by at least $350,000, that conclusion is largely irrelevant to our determination now.

Id.

The action of the First Circuit Court of Appeals in setting damages at $250,000 constitutes an impermissible intrusion into the role of the trial court in reviewing the jury's verdict. The District Court's denial of the motion for remittitur must be affirmed. Alternatively, the case must be remanded to the District Court for an independent review.

CONCLUSION

For the reasons stated herein, the Petitioner respectfully requests that the Petition for Certiorari be GRANTED and that the decision of the First Circuit Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX

Richard KOSTER, Plaintiff, Appellee,
v.

TRANS WORLD AIRLINES, INC., Defendant, Appellant.

No. 98-1757.
United States Court of Appeals,
First Circuit.
Heard Dec. 8, 1998.
Decided June 21, 1999.

Appeal from the United States District Court for the District of Massachusetts. [Hon. Joseph L. Tauro, U.S. District Judge]

Joseph Baumgarten, with whom Proskauer, Rose, LLP, James R. DeGiacomo, Judith K. Wyman and Roche, Carens & DeGiacomo, P.C. were on brief, for appellant.

Michael M. McArdle, with whom Earl D. Munroe and Munroe & McArdle were on brief, for appellee.

Before Boudin, Circuit Judge, John R. Gibson, (FN*) Senior Circuit Judge, and Lynch, Circuit Judge.

JOHN R. GIBSON, Senior Circuit Judge.

Trans World Airlines furloughed forty-seven year old Richard Koster as part of a 1994 work force reduction. Koster brought suit, invoking diversity jurisdiction, and a jury determined that TWA had engaged in illegal age discrimination under Massachusetts law, and awarded

Koster $1,000,000 in damages. The district court doubled the damages pursuant to a Massachusetts statute and awarded prejudgment interest and attorneys' fees. TWA argues the district court erred in these latter rulings and (1) by denying its motion for a directed verdict and for judgment as a matter of law; (2) in the admission of evidence; and (3) by refusing a requested supplemental jury instruction. We affirm the jury's verdict and award of attorneys' fees, but reverse the award of damages and remand the case for further proceedings on the issue of damages.

TWA hired Koster in 1965, and he initially worked at John F. Kennedy Airport in New York. He was reassigned to Logan Airport in Boston in 1977, and employed in various supervisory positions until his furlough in August 1994. Koster's last position was Supervisor, Ground Operations. He was responsible for Logan's garage, mail, air freight, dining, commissary and store areas. He earned $40,000 per year. TWA consistently promoted Koster and also asked him to take on special assignments when problems arose. Koster's performance evaluations consistently described him as an excellent employee.

In response to TWA's financial difficulties over the last decade, TWA has instituted pay cuts, reductions in force, and restructurings. In August 1994, TWA's senior management asked Gordon Humpherys, the station manager for Logan Airport, to implement a reduction in force. Humpherys was responsible for TWA's entire station operations at Logan, and Koster reported directly to him. Specifically, TWA management told Humpherys to reduce six supervisor positions to four.

At trial, Humpherys explained that the reduction in force would require the remaining four supervisors to do the work formerly done by six. Thus, his "foremost concern" was to retain those supervisors "who would provide the most productivity" and be best able to run the operation with a minimum of supervision and direction. Humpherys ultimately elected to keep Kathy Hobbs (age 44), Glenn Hutmire (age 56), Henry Sledz (age 49), and Robinanne Stancavage (age 25). He selected Koster (age 49) and Robert Spencer (age 48) for furlough.

Under TWA's Policies and Procedures, a management employee selected for furlough remains eligible for recall for a five-year period. The employee may also elect to take a position equivalent to the last position he or she held before entering management. Koster was entitled to take a position as a transportation agent, which would have paid $26,000 per year. He elected, however, to take the furlough, hoping he would be recalled. Koster unsuccessfully applied for several openings at TWA, but in the spring of 1995, Koster elected early retirement in order to obtain his retirement benefits.

Following his decision to retire, Koster opened up a Minuteman printing franchise. At the time of trial, Koster had yet to take a salary. Koster estimated his back-pay damages at $159,175, and total losses for future pay at $120,819. After the furlough, Koster suffered from anxiety and had trouble sleeping at night. He suffered from heartburn and had to take antacid pills on a regular basis.

Koster filed suit against TWA alleging age discrimination

in violation of the Massachusetts Fair Employment Practices Act, Mass. Gen. Laws ch, 151B, and breach of contract. The district court dismissed the contract claim at the close of Koster's evidence, and submitted the age claim to the jury. The jury returned a verdict for Koster, awarding $1,000,000. The court awarded $155,807.50 in attorneys' fees, prejudgment interest on all but the front-pay portion of the damage award, and an additional $1,000,000 pursuant to Mass. Gen. Laws ch. 151B, § 9, finding that TWA acted with knowledge or reason to know that it violated the provisions of Mass. Gen. Laws ch. 151B, § 4. TWA appeals.

I

TWA first argues that the district court erred by denying its motion for judgment as a matter of law because Koster failed to: (1) establish a prima facie case of age discrimination; and (2)show that TWA's articulated non-discriminatory reasons for his furlough were pretextual.

We review de novo the trial court's decision to deny a motion for judgment as a matter of law. We view the evidence in the light most favorable to Koster, drawing all reasonable inferences in his favor. *See Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 716 (1st Cit. 1994). We "may reverse the denial of such a motion only if reasonable persons could not have reached the conclusion that the jury embraced. " *Id.*

In discrimination cases arising under Chapter 151B of the Massachusetts law, courts have traditionally applied the three-stage order of proof articulated in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 802-05, 93 S.Ct. 1817,

36 L.Ed.2d 668 (1973). (FN1) *See Lehman v. Prudential Ins. Co.*, 74 F.3d 323, 327-28 (1st Cir.1996); *Blare v. Husky Injection Molding Sys.*, 419 Mass. 437, 646 N.E.2d 111, 114-15 (Mass.1995). Under that standard, a plaintiff who was terminated as part of a reduction in force can generally establish a prima face case of discrimination by showing that (1) he was at least forty years old; (2) he met the employer's legitimate job performance expectations; (3) he experienced adverse employment action; and (4) the employer did not treat age neutrally, or that younger persons were retained in the same position. *See LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 842 (1st Cir.1993), *cert. denied*, 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994).

If the employee establishes a prima facie case, there is a presumption that the employer engaged in impermissible age discrimination. *See Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 348 (1st Cir.), *cert. denied*, *--- U.S - ----- 119* S.Ct. 341, 142 L.Ed.2d 281 (1998). To rebut this presumption, the employer must articulate a legitimate non-discriminatory reason for the employee's termination. *See Id.* This entails only a burden of production; the burden of persuasion of discrimination remains with the employee. *See Id.* Once the employer has proffered a legitimate, non-discriminatory reason for its adverse employment decision, the presumption generated by the employee's prima facie case disappears, and the employee then has the burden to prove that the reason advanced by the employer for the adverse employment action constituted a mere pretext for unlawful age discrimination. *See Id.* Age discrimination plaintiffs in Massachusetts have a lesser burden than those under federal law. Massachusetts law requires the employee

to show only pretext, whereas under First Circuit ADEA law, the mere showing of pretext does not entitle plaintiff to a verdict. *See Mullin v. Raytheon Co.,* 164 F.3d 696, 699 (1st Cir.1999), *pet. for cert. filed,* May 5, 1999 (No. 98-1779); *Kelley,* 140 F.3d at 348-49; *Blare,* 646 N.E.2d at 444-45. Therefore, a plaintiff is entitled to judgment on his claim if he establishes a prima facie case and persuades the trier of fact that the employer's articulated justification is pretextual. *See Kelley,* 140 F.3d at 349.

-A-

TWA concedes that Koster was in the protected age group and suffered an adverse employment action. TWA argues, however, that Koster did not establish a prima facie case of age discrimination because he did not prove that he was replaced in his position as Supervisor, Ground Operations, that TWA retained younger employees in the same position, or that TWA's selection process was not age neutral.

TWA failed to preserve its challenge to the sufficiency of Koster's prima facie case. TWA's motions for directed verdict, made at the close of Koster's evidence and at the close of all of the evidence, challenged Koster's failure to prove pretext, not his failure to prove a prima face case. "Appellate review may be obtained only on the specific grounds stated in the motion for directed verdict." *See Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors,* 850 F.2d 803, 810 (1st Cir.) , *cert. denied,* 488 U.S. 955, 109 S.Ct. 392, 102 L.Ed.2d 381 (1988).

Moreover, we are persuaded that Koster established a

prima facie case of age discrimination. *Mesnick v. General Elec. Co.,* 950 F.2d 816, 823 (1st Cir.1991)(burden is "not onerous."). In an answer to a special interrogatory, the jury found that Koster established a prima facie case of age discrimination. This finding is well supported by the evidence. Although no one took over Koster's exact job, his duties were subsumed by other employees, some of whom were younger, one substantially younger, than him. In a reduction in force, a prima facie case requires only that Koster show that TWA did not treat age neutrally in deciding who to furlough. *See Hidalgo v. Overseas Condado Ins. Agencies, Inc.,* 120 F.3d 328, 333 (Ist Cir. 1997). Thus, sufficient evidence existed to allow a reasonable jury to find that Koster met his burden of proving a prima facie case of discrimination.

-B-

TWA next argues that Koster failed to present sufficient evidence from which a jury could reasonably infer that the reasons for TWA's discharge were a pretext for age discrimination. TWA argues that Koster failed to show that TWA did not have a legitimate need to reduce its work force at Logan, and furthermore, did not address the fact that three of the four retained supervisors were also in the protected age class.

Koster does not argue, however, that the reduction in force itself was pretextual. Instead, Koster relies on evidence that TWA's stated reasons for selecting him for furlough were false. In answers to special interrogatories, the jury specifically found that TWA "had not presented credible evidence of a legitimate business purpose for the

furloughing of Mr. Koster in August, 1994" and that "Koster has proven that the reason given by [TWA] for his furlough in August 1994 was a pretext for age discrimination." The jury could reasonably make this finding of pretext from the circumstances surrounding Humpherys's selection process. Humpherys testified that he selected Koster for furlough because Humpherys "didn't think he had sufficient people skills, [and] his attitude was not sufficiently good for him to be able to manage the operations on a regular basis." Other witnesses testified, however, that Koster had a very good relationship with employees, and that he was knowledgeable, very professional, and a hard worker. Hutmire, one of the retained supervisors, testified that Koster was a leader and "a workaholic." Koster had perfect attendance record in fourteen out of seventeen years. Koster had been designated acting station manager to fill in for Humpherys on at least two occasions.

In addition, Humpherys testified that in evaluating the supervisors he ranked Koster the "lowest performer." Humpherys admitted, however, that Koster got the job done and that the performance of his crews was satisfactory. He ranked Koster even below Spencer who he testified was "constantly late" and "not a strong supervisor." Humpherys ranked twenty-five year old Stancavage as the second best supervisor of the group, even though she had only three months of supervisory experience. Koster hired Stancavage in 1989 as a customer service agent. She quit on November 15, 1992, and returned to TWA in June of 1993 as a part-time customer service agent. On January 24, 1994, she was promoted to a full-time employee as a customer service agent in charge. On April 25, 1994, she became a

Supervisor, Ground Operations. There was evidence that Stancavage had a full scholarship at M.I.T. and was working for TWA only until she could return to school. Humpherys's primary explanation as to why he decided to retain Stancavage over Koster was that she was "enormously creative" and "very enthusiastic."

After comparing the qualifications of Koster and Stancavage, there is abundant evidence supporting the conclusion that a reasonable employer would have found Koster significantly more qualified than Stancavage, a twenty-five year old employee with three months of supervisory experience. The jury could also reasonably conclude that Koster fit the selection criteria established by Humpherys and that Stancavage did not. Koster obviously made a longterm commitment to working for TWA, while evidence suggested that Stancavage planned to work for TWA until she returned to school. "[A]n employer's asserted strong reliance on subjective feelings about candidates may mask discrimination." *Aka v. Washington Hosp.Ctr.*, 156 F.3d 284, 1297 (D.C.Cir.1998) ("enthusiasm"). That three of the four retained supervisors were in the protected age class is of little importance because Koster need only show that TWA furloughed him because of his age. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). Moreover, Stancavage is substantially younger than Koster. *See Id.* at 313. The jury's disbelief of the reasons set forth by TWA (particularly if the disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, permit the jury to infer the ultimate fact of intentional discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct.

2742, 125 L.Ed.2d 407 (1993); *Aka*, 156 F.3d at 1294 (discrimination can be inferred from evidence that employer selected a significantly less qualified candidate). Koster established pretext by showing that TWA's proffered explanation is unworthy of credence. The court did not err in denying TWA's motion for judgment as a matter of law.

II.

TWA also argues that the district court's admitting a section of the TWA Management Policy and Procedure Manual and allowing Koster to testify about other employees who had left TWA was reversible error.

-A-

Section 10.66.01 of the Manual applied to salaried personnel. The policy section of the provision stated: "[s]alaried seniority will determine the order of force reduction and displacements of Salaried employees," and stated that in a reduction in force, employees should be let go in the following order: contingent employees, probationary employees, regular part-time or full-time employees. (FN2)

TWA contends that this provision applied only to salaried employees and did not apply to Koster as a management employee, and the district court abused its discretion in allowing the jury to consider this evidence.

We review evidentiary decisions of the trial court for abuse of discretion. *Nieves- Villanueva v. SotoRivera*, 133

F. 3d 92, 98 (1st Cir. 1997).

The district court did not abuse its discretion in admitting section 10.66.01 of the manual, or in refusing to give a curative instruction. Although TWA argues that this provision does not apply to Koster because he was "management" and not "salaried," there was evidence that this provision applied to Koster. First, Koster's furlough letter from TWA referred Koster to section 10.66 for "a statement of his rights with respect to his seniority." Second, Koster testified that he thought that the provision applied to all salaried management employees other than contract (union) labor. He explained that his employee records showed that he was subject to a 14% pay cut in 1986 applicable to "salaried" employees, and he believed the provision applied to him. Thus, a question of fact existed as to whether the provision applied to Koster, and the court did not abuse its discretion in admitting the provision, or refusing to instruct the jury that the section did not apply to Koster. *See* Fed. R. Evid 104(b).

-B-

TWA further argues that the district court erred in allowing Koster to testify about TWA's treatment of other employees and in denying TWA's request for a supplemental jury instruction advising the jury that it could not consider such anecdotal evidence. TWA contends that the evidence lacked foundation, and that there was no nexus between the other terminations and Koster's termination. TWA further argues that allowing the evidence contradicted the district court's pre-trial ruling that Koster's "other employee" evidence was not relevant.

In a pre-trial order, the court granted TWA's motion in limine prohibiting Koster from calling six former employees to testify about how TWA furloughed them during other work force reductions. The district court reasoned that such testimony was "collateral," and would require the court to examine "the circumstances of each individual firing."

At trial, Koster testified that during previous reductions in force, he knew other employees over age fifty who TWA had released or furloughed or who had retired. Specifically, Koster testified that he knew over one hundred front-line management employees during his career, and only one retired at age 62 or older. Koster gave examples of TWA employees he had known who were over fifty and who had lost their jobs.

Koster's testimony did not violate the pretrial order. The trial court ruling prohibited Koster from calling collateral witnesses to testify about the circumstances surrounding the furloughs of older supervisors. The order did not prohibit Koster from testifying about his own observations of what happened to other employees at TWA. During trial, the court clarified that it would allow Koster to testify about what he perceived regarding the reorganizations. (FN3)

TWA argues that the anecdotal testimony is not indicative of age discrimination or of pretext and should not have been admitted. TWA portrays the evidence as irrelevant and highly prejudicial, warranting reversal.

In *Goldman v. First National Bank*, 985 F. 2d 1113,

1119-21 (Ist Cir.1993), we held that plaintiff's anecdotal evidence was insufficient to form the basis for a finding of age animus. In *Goldman,* the employee had presented the affidavits of eight other employees who stated that they were the oldest employee in their unit and had been performing adequately when their employer dismissed them pursuant to a reduction in force. *Id.* at 1119. We held that "evidence of this sort does little more than corroborate what was undisputed: that members of the protected class were terminated as part of the reduction in force." *Id.* (internal quotations omitted).

Contrary to TWA's argument, *Goldman* did not hold that anecdotal evidence is not admissible and always prejudicial. *Goldman* simply held that the anecdotal evidence presented could not, by itself, establish age animus. *Id.* at 1119. Accord *Shorette v. Rite Aid Inc.,* 155 F. 3d 8, 16-17 (1st Cir. 1998); *LeBlanc,* 6 F.3d at 847. Indeed, we recently observed that "while proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination ... it may add color to an employer's decision making process." *Brennan v. GTE Gov't Sys. Corp.,* 150 F.3d 21, 28 (1st Cir.1998)(internal quotations omitted). Here, as in *Brennan,* Koster's anecdotal evidence was just a part of his age discrimination picture. The admissibility of Koster's anecdotal evidence was a judgment call, as was the refusal of the requested instruction. Exclusion would not have been an abuse of discretion, but neither was admission.

III

TWA argues the district court abused its discretion in denying TWA's motion for remittitur or, in the alternative, a

new trial on damages. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (abuse of discretion standard). TWA, however, bears a heavy burden of showing that an award is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." *Havinga v. Crowley Towing & Transp. Co.*, 24 F.3d 1480, 1484 (1st Cir. 1994). We will not disturb an award of damages because it is extremely generous or because we think the damages are considerably less. *See Id.* We will only reverse an award if it is so grossly disproportionate to any injury established by the evidence as to be unconscionable as a matter of law. *See Id.; Clausen v. Sea-3, Inc.*, 21 F.3d 1181, 1198 (1st Cir.1998) (remittitur appropriate only when verdict "so exorbitant").

TWA does not attack the entire damage award. TWA first takes issue with the damages for emotional distress. Koster's evidence of lost wages (back pay and front pay) amounted to approximately $284,000; thus, TWA argues that the balance of $716,000 represents damages for emotional distress and is excessive. Koster responds that the $716,000 does not necessarily constitute emotional damages, and the jury could have easily decided that Koster's total losses for front pay far exceeded the $120,819 he testified about.

Koster's testimony, however, as to back pay and future pay was quite specific. (FN4) His attorney in closing argument reiterated that his economic damages totaled $283,995. In the face of such firm evidence of economic damage, we cannot say that the jury could reasonably conclude Koster was damaged above and beyond what he

said his damages were. *See Kelley,* 140 F.3d at 355-56.

Although determining whether damages for emotional distress are excessive is difficult, such damages are not immune from review. *See LaBonte,* 678 N.E.2d at 861-62. The Massachusetts. Supreme Judicial Court held that a $550,000 award for emotional distress was excessive in *LaBonte.* In that case, a law firm fired an employee after the employee developed multiple sclerosis. *Id.* at 855-56. There was evidence that the employee was depressed and that "his confidence was shattered" by the termination. *Id.* at 861. Although the court acknowledged that the employee suffered from depression and sought counseling, it nevertheless concluded that the $550,000 award for emotional distress was excessive. *Id.* at 861-62. The court reasoned that the damage award was grossly disproportionate to the evidence of injury. The plaintiff had not been hospitalized and never took medication to combat his depression, and his depression abated after he found a new job. *Id.* The court concluded that his depression, while real and significant, did not rise to the level awarded by the jury. *Id.* The case was remanded to the trial court to determine the amount of remittitur.

Although testimony from a mental health expert is not required to sustain an award for emotional distress, the absence of such evidence is useful in comparing the injury to the award of damages. For example, in *Sanchez,* a jury awarded $150,000 in emotional distress damages to a plaintiff in an age discrimination case. 37 F.3d at 723. The district court reduced the award to $37,500, and we affirmed. *Id.* at 723, 726. The plaintiff in *Sanchez* testified about the humiliation he suffered from losing his job and

filing for bankruptcy. We indicated that although emotional damages are warranted even without medical or psychiatric evidence, the lack of such evidence is relevant to the amount of award. *Id.* at 724 n. 13.

One of the highest emotional distress judgments in Massachusetts was awarded in *Westinghouse Electric Supply Corp. v. Massachusetts Commission Against Discrimination*, No. CIV. A. 97-4267E, 1999 WL 140492 (Mass.Dist.Ct. Mar. 5, 1999). In that case, Westinghouse fired an experienced salesman after he developed Crohn's disease. *Id.* at * 1-2. The claimant suffered from severe depression, insomnia, constant diarrhea, and stomach pain, and the Massachusetts Commission awarded him $250,000 for emotional distress. Id. at *3. The Massachusetts court affirmed the award, concluding it was "within the realm of other emotional distress awards," and that "the exacerbation of his illness and consequent termination may support a higher award of damages." *Id.* at * 10- 11, n. 16 and 17. Although the evidence of injury was much more severe in *Westinghouse*, the claimant received about a half a million dollars less than Koster. *See Id.* at *10 (humiliation, depression, inability to eat, constant diarrhea and pain). In *Westinghouse*, there was no evidence that the claimant found another job as Koster did.

Despite the strict standard of review, courts have ordered remittiturs in a number of cases. *See, e.g., Fontaine v. Ebtec Corp.*, 415 Mass. 309, 613 N. E. 2d 881, 883-84 & n. 3 (Mass. 1993) (emotional distress damages reduced from $80,000 to $25,000); *Powers v. H.B. Smith Co.*, 679 N.E.2d at 252, 254 (Mass. App. Ct. 1997)(damage award (front-pay and emotional distress) reduced from $750,000 to

$350,000); *Kelley,* 140 F.3d at 345 (emotional distress damages reduced from $250,000 to $150,000); *United States v. Sanchez,* 37 F.3d at 723 (emotional distress damages awarded under Puerto Rico statute reduced from $150,000 to $37,500). *Accord Hetzel v. County of Prince William,* 89 F.3d 169, 173 (4th Cir.1996)(award of $500,000 grossly excessive), *cert. denied,* 519 U.S. 1028, 117 S.Ct. 584, 136 L.Ed.2d 514 (1996); *see also Brownlie v. Kanzaki Specialty Papers, Inc., 44* Mass.App.Ct. 408, 691 N.E.2d 953, 955 (Mass.App.Ct.1998) (emotional distress damages of $50,000).

There is no doubt that Koster suffered emotionally following his furlough. Koster had worked for TWA for over twenty-five years and was devoted to his job. His seniority status at TWA allowed him job and vacation flexibility, and he found his work extremely gratifying. After the furlough, Koster had trouble sleeping and was anxious. A vacation to Hawaii "did not go well." He took antacid pills on a regular basis. His new job requires him to work more, and he earns less. His family life has suffered. His wife has had to return to work, and he is not able to participate as fully in the activities of his four children. Following *LaBonte,* however, we believe the award is grossly disproportionate to the evidence of emotional distress. There was no evidence that Koster ever sought medical treatment or suffered any long-term depression or incapacitation. Koster was able to open up a business of his own and anticipates taking a salary within two years. Although we acknowledge that the furlough of Koster was particularly painful because of his devotion to TWA, we also recognize that he could have remained with TWA, albeit in a different job with a reduced salary.

Accordingly, we conclude that the evidence of injury was grossly disproportionate to the award for emotional distress, and is excessive as a matter of law. We recognize that we have the option of selecting a reduced damages figure ourselves based on the evidence adduced at trial, or remanding the case to the district court for a determination of damages. *See, e.g., Anthony v. GMD Airline Services, Inc.*, 17 F.3d 490, 495 (1st Cir.1994); *Marchant v. Dayton Tire & Rubber Co.*, 836 F.2d 695, 704 (1st Cir. 1988).

Although we recognize the esoteric nature of damages for emotional distress, in view of the fact that the district court denied TWA's motion for a remittitur, we think the best course is to follow the "maximum recovery rule" authorized by this circuit. *See Id.* Under that rule, we condition our ruling that a new trial on damages is appropriate on Koster's declining to remit our determination of Koster's damages. After our careful review of the record and thoughtful consideration of other cases, we believe the evidence of emotional distress would support a maximum recovery of emotional damages of $250,000. (FN5) We believe that amount represents the highest amount of damages for emotional distress for which there is adequate evidentiary support. We thus grant a new trial on the issue of emotional damages only, and condition our order on Koster's declining to remit $466,000 of the total amount awarded by the jury. (FN6)

IV

TWA argues the trial court erred in awarding Koster double damages. (FN7) TWA contends that Chapter 151B

requires the court to make a specific finding to warrant the imposition of double damages. TWA speculates that the district court "may have construed" the double damages provision as mandatory, not discretionary.

Following the jury's verdict, the district court simply stated: "Okay. The issue now is whether I am going to double the award. And I am. So, I will make ... a finding that I think it is appropriate to double the jury award. And I will do it." The court's May 18, 1998, order tracked the statutory language of Mass. Gen. Laws ch. 151B, § 9. TWA states that *Brownlie,* 691 N.E.2d at 962, requires the district court to make specific findings that the employer knew that the discriminatory act violated the age discrimination law. Although the court's findings in *Brownlie* were much more specific than the court here, we are convinced that the specificity was gratuitous and not required by the statute.

Neither the statute nor the relevant case law requires that the district court do anything more than enter a finding that the employer acted with knowledge or reason to know that it violated the anti-discrimination statute. *See Brownlie,* 691 N.E.2d at 962. *See also Kelley,* 140 F.3d at 345 (multiplying damages by 2.25). The statute simply requires a finding that the employer satisfied the knowledge element of the statute.

Although the district court did not provide a detailed analysis supporting its finding, the judge affirmatively found that it was appropriate to double the damage award. This statement is easily translated into a finding, supported by the record, that TWA acted with knowledge or reason to know. The evidence of Humpherys's explanation for

selecting Koster for furlough was not credible. TWA's vice president of employee relations, Thibaudeau, testified about TWA's policy prohibiting age discrimination, and about how the policy was communicated to all managers. This evidence supports the finding that TWA acted with knowledge of its violation of Massachusetts law.

TWA also suggests that the district court "may" have thought double damages were mandatory. TWA refers us to the multiple damage provision of the consumer protection law, which courts have recognized requires more than a "knowing violation," despite the statutory language which suggests a less rigorous standard. *See Cambridge Plating Co. v. NAPCO, Inc.*, 85 F.3d 752, 770 (1st Cir. 1996). First, it is obvious from the court's finding that it only considered the doubling mandatory if TWA's conduct met the standard of knowledge required by the statute. *Fontaine* instructs that double damages are mandatory if the knowledge standard of the statute is met, and that triple damages are discretionary. *See* 613 N.E.2d at 322 ("a certain recovery of at least double damages"). Although the language of the provision in the consumer protection statute is similar, none of the cases under the age discrimination statute suggest that the knowledge requirement is higher than that suggested by the statute. *See, e.g., Brownlie*, 691 N.E.2d at 962; cf. *Cambridge Plating*, 85 F.3d at 770-771. The court did not err in awarding double damages.

V

TWA argues that the attorneys' fee award of $155,807.50 is excessive. Our review of the attorneys' fee award is governed by Massachusetts Law. *Krewson v. City of*

Quincy, 74 F. 3d 15, 17 (1st Cir. 1996).

The amount of a reasonable attorneys' fee, awarded on the basis of statutory authority, is largely discretionary. *See Fontaine*, 613 N.E.2d at 890.

TWA argues that the fee should be vacated because the court abused its discretion in awarding Koster his full attorneys' fees. TWA contends that the case did not warrant the participation of three attorneys, and the court should have reduced the award to take into account that Koster lost on his breach of contract claim.

The district court, however, determined that the fees were reasonable. The judge stated:

> Very frankly, I find the hours reasonable, the amount of time spent. The fact that there were three lawyers on one side and two on the other side, I don't find disproportionate. It is probably fair, especially that you, Mr. DeGiacomo, are one of the most experienced and highly regarded trial lawyers in the city. You could almost argue that it takes three against one, that three against one makes it fair.

TWA does not challenge the billing rate of the attorneys nor does it suggest that the time was duplicative. It simply argues that "this was not a case warranting the investment of three attorneys."

We find no abuse of discretion in allowing recovery for the time spent by three attorneys. TWA does not suggest the time spent by three attorneys was duplicative, just that it

was unnecessary. After consideration, the district court rejected this argument. Counsel's time spent pursuing unsuccessful claims, however, is generally non-compensable "unless it can be shown that the [unsuccessful and successful] claims were interconnected." *Krewson*, 74 F.3d at 19. "Interconnection" can be found when the "claims include[ ] a common core of facts or were based on related legal theories." *Lipsett v. Blanco*, 975 F. 2d 934, 940 (1st Cir.1992) (quotations omitted). Although it may be true that Koster's breach of contract and discrimination claims arose out of the same cluster of facts, we need not decide this question because it is the fee target's burden to show a basis for segregability. *See Id.* at 941. TWA did not meet this burden either before the district court or this court.

We affirm the judgment of the district court except for the award of damages. We order a new trial on the issue of emotional damages only if Koster decides not to remit $932,000 (plus any interest accrued).

FN* Of the Eighth Circuit, sitting by designation.

FN1. The Massachusetts age discrimination statute states in relevant part:

It shall be an unlawful practice:

1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. Mass. Gen. Laws ch. 151B, § 4.

FN2. The section stated:

When a reduction in force in a job classification is necessary, reductions shall occur in the following order:

a. Contingent employees--dismissed prior to regular part-time employee furloughs.

b. Probationary employees--dismissed without prejudice in discretionary order.

c. Regular part-time or full-time employees-reduced in inverse order of seniority.

FN3. The parties dispute whether TWA objected to Koster's testimony on this issue. TWA states that it objected "in nearly every instance." We have carefully reviewed the trial transcript and do not characterize TWA's objections as quite so pervasive. We observe, however, that TWA objected to Koster's testimony about a 1974 reorganization and its impact on older workers, particularly Koster's uncle. The court clarified that Koster could not testify generally about the impact reorganizations had on older workers, but that he could testify about his own observations about the impact on specific workers. TWA's counsel stated: "I will object beyond this point." Thus, TWA adequately preserved its objection to this evidence.

FN4. Even if we decided that the $1,000,000 award included economic damages in excess of the $284,000 Koster testified about, those economic damages do not have "adequate evidentiary support" and may also warrant a

remittitur. *See* FN5- Of course, this amount is subject to the discretionary multiplier. *See Kelley,* 140 F.3d at 356.

FN6. Or, $932,000 after application of the discretionary multiplier.

FN7. If the court finds for the petitioner, "recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice violated the provisions of said section four Mass. Gen. Laws ch. 151B, § 9.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1757

RICHARD KOSTER
Plaintiff, Appellant

v.

TRANS WORLD AIRLINES, INC.
Defendant, Appellant

JUDGMENT

Entered: June 21, 1999

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed except for the award of damages. We order a new trial on the issue of emotional damages only if Koster decides not to remit $932,00 (plus any interest accrued).

By The Court
Phoebe D. Morse, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. Baumgarten, McArdle]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1757

RICHARD KOSTER
Plaintiff, Appellant

v.

TRANS WORLD AIRLINES, INC.
Defendant, Appellant

BEFORE

Tauro, Ch. J.,

ORDER OF COURT

Entered: May 14, 1999

A Jury verdict having been rendered in the amount of $1,000,000.00 in favor of Plaintiff and against Defendant as to the remaining count of Plaintiff's Complaint (Count I), the court hereby orders as follows:

1. Defendant shall pay Plaintiff $155,807.50, representing the reasonable attorneys' fees incurred by Plaintiff;

2. Defendant shall pay Plaintiff $4,855.85, representing the costs incurred by Plaintiff;

3. Defendant shall pay Plaintiff prejudgment interest at a rate of twelve percent (12%) per annum from the date of the commencement of this action of $875,180.07, representing the statutorily mandated interest on Plaintiff's pecuniary and consequential damages, exclusive of the $124,819.93 in front pay claimed; and

4. Defendant shall pay Plain tiff an additional $1,000,000.00, reflecting this court's finding, pursuant to M.G.L. c. 151B §9, that the act or practice complained of was committed with knowledge, or reason to know, that such arct or practice violated the provisions of M.G.L. c. 151B §4.

IT IS SO ORDERED.

/S/
Joseph L. Tauro
Chief United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1757

RICHARD KOSTER
Plaintiff, Appellant

v.

TRANS WORLD AIRLINES, INC.
Defendant, Appellant

BEFORE

Torruella, Chief Judge
Gibson*, Senior Circuit Judge,
Selya, Boudin, Stahl, Lynch, Lipez, Circuit Judge

ORDER OF COURT

Entered: July 20, 1999

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by

the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

by the Court:

PHOEBE MORSE
Clerk

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of the Eighth Circuit, Sitting by designation

[cc: Messrs. Baumgarten, DeGiacomo, MacDonald, Munroe, McArdle and Ms. Wyman]